



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Marinette County Department of Human Services, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 175109

Pursuant to petition filed June 21, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Marinette County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Thursday, August 4, 2016 at 11:15 AM at Racine, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

NOTE: The record was held open until August 15, 2016 to allow the parties to supplement the record. The Respondent submitted no documentation by the designated deadline. The agency submitted print outs for August, September and October 2014. They have been marked as Exhibit 9 and entered into the record.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Marinette County Department of Human Services
By ██████████, Fraud Investigator
Wisconsin Job Center, Suite B
1605 University Drive
Marinette, WI 54143

Respondent:

██████████
██████████
██████████

I

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # ██████████) is a resident of Racine County.

2. The Respondent was incarcerated from September 26, 2014, through March 8, 2016. (Testimony of the Respondent; Exhibit 2)
3. Someone used the Respondent's EBT card to complete transactions between October 18, 2014 and October 31, 2014. (Exhibit 3)
4. Respondent was the only person in her FoodShare household during the time in question. (Exhibit 9)
5. On June 30, 2016, Marinette County prepared an Administrative Disqualification Hearing Notice alleging that the Respondent allowed a person outside her FoodShare household to use her benefits while she was incarcerated. (Exhibit 8)

DISCUSSION

What is an Intentional Program Violation?

7 C.F.R. §273.16(c) states that Intentional Program Violations “shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device).”

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is the agency's burden of Proof?

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence"(a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there might be reasonable doubt that the elements have been shown.

The Merits of the agency's Case

In the case at hand, the asserts that the Respondent violated the rules of the FoodShare / food stamp program by allowing someone to use her EBT card while she was incarcerated.

7 CFR §274.7 Benefit redemption by eligible households.

(a) *Eligible food.* Program benefits may be used only by the household, or other persons the household selects, to purchase eligible food for the household, which includes, for certain households, the purchase of prepared meals, and for other households residing in certain designated areas of Alaska, the purchase of hunting and fishing equipment with benefits.
Emphasis added

An individual may have one authorized buyer who has access to his account, but in such a situation, a second EBT card should be issued in the authorized user's name, with a unique Personal Identification Number and a Primary Account Number (PAN) with an indicator of "03". See Wis. Admin. Code §§252.04 and 252.07. See also *Process Help Manual (PHM) §80.1.2.3* This authorized buyer would be designated on the Representatives Details page in the Cares Worker Web database. *Process Help Manual (PHM) §80.1.2.3*

In the case at hand, the card used in the subject transactions after March 4, 2014, was that of the Respondent, not an authorized buyer. (See Exhibit 3)

The [REDACTED] printout only shows the Respondent as the only member of her household. (Exhibit 9)

The Respondent testified that she did not give anyone permission to use her EBT card while she was incarcerated. The Respondent testified that she believes her ex-fiancé, "[REDACTED]", was the person took her EBT card and used it without permission. The Respondent testified that "[REDACTED]" had access to her EBT card, because she shared a residence with "[REDACTED]" and left the EBT card at home when she was arrested. The Respondent further testified that "[REDACTED]" would have had the pin number, because "[REDACTED]" would assist the Respondent with shopping, because the Respondent has health issues related to a Chiari malformation which affects her memory. The Respondent testified that she has filed a police report.

While it would have been nice if the Respondent had provided copies of the police report, the fact remains that the burden of proof lies with the agency to prove the EBT card was used with the Respondent's consent. The Respondent's account of what happened is plausible. The agency has presented no evidence to rebut the Respondent's testimony.

Accordingly, it is found that the agency has not established by clear and convincing evidence that the Respondent gave another person permission to use her EBT card while she was incarcerated.

I note to the Respondent that this decision does not relieve her of liability for the overpayment established in case FOP-168123. The burden of proof in overpayment cases is the lower, preponderance of the credible evidence standard and the agency apparently met that lower burden in that case.

Further, regardless of whether the Respondent caused the overpayment by foolishly sharing her PIN with an untrustworthy person or whether it was caused by an intentional program violation, she must pay overpayment. The federal regulation concerning FoodShare overpayments requires the State agency to recover all overpayment whether they are caused by intentional program violations, inadvertent household errors (also known as a "client error"), or by agency errors (also known as a "non-client error"). 7 C.F.R. § 273.18(b); see also *FoodShare Wisconsin Handbook, (FSH) § 7.3.2.1*. As such, it does not matter whose error caused the overpayment; it must be recovered.

CONCLUSIONS OF LAW

The agency has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an Intentional Program Violation.

NOW, THEREFORE, it is ORDERED

IPV claim number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

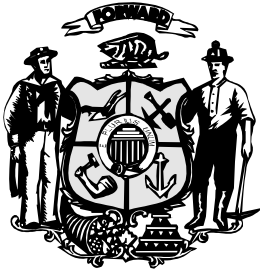
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 26th day of August, 2016

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Bay Lake Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on August 26, 2016.

Marinette County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@marinettecounty.com